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Access to Information About Lethal Injections: A First Amendment Theory Perspective on Creating a New Constitutional Right

by CLAY CALVERT,⊗ EMMA MOREHART,♥ KÉRAN BILLAUD◇ AND KEVIN
BRUCKENSTEINA

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I. Introduction

*Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final moments.*¹

So wrote Alex Kozinski, the iconoclastic² chief judge of the U.S. Court of Appeals for the Ninth Circuit, in a stinging dissent from that court's July 2014 denial of a petition for rehearing en banc in the capital punishment case of *Wood v. Ryan*.³ The dispute pivoted on the execution of convicted double-murderer Joseph Rudolph Wood III,⁴ and it raises the timely and important constitutional issue at the heart of this article.

Specifically, how much support do three well-established theories of free expression—namely, the marketplace of ideas,⁵ democratic self-governance⁶ and self-realization/human dignity⁷—provide for establishing a new First Amendment⁸ right of public access to detailed, factual information about lethal-injection personnel, procedures, and drugs? Those theories are significant because the current state of First Amendment doctrine, particularly under the two-part test from *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*)⁹ for access to government

1. *Wood v. Ryan*, 759 F.3d 1076, 1102–03 (9th Cir.) (Kozinski, C.J., dissenting), *vacated*, 135 S. Ct. 21 (2014).

2. See Carl Tobias, *A New No. 1 at the 9th Circuit*, L.A. TIMES (Nov. 30, 2007), <http://articles.latimes.com/2007/nov/30/opinion/oe-tobias30> (“[Kozinski] enjoys a well-deserved reputation as an iconoclast or, some would say, eccentric. Born to Holocaust survivors in Bucharest, Romania, Kozinski came to the U.S. at 12.”). Kozinski was first appointed to the Ninth Circuit in 1985. See *Kozinski Wins Seat on U.S. Appeals Court in S.F.*, S.F. CHRON., Nov. 8, 1985, at News 10 (“[The] Senate confirmed a controversial nominee, Alex Kozinski, to the U.S. Court of Appeals in San Francisco yesterday[.] Kozinski, 35, will become the youngest federal appellate judge in the nation. For the past three years, he has been chief judge of the U.S. Claims Court in Washington, D.C.”).

3. *Wood*, 759 F.3d 1076.

4. *Id.* at 1077–78.

5. See *infra* Part IV, Section A (providing an overview of this theory).

6. See *infra* Part IV, Section B (providing an overview of this theory).

7. See *infra* Part IV, Section C (providing an overview of this theory).

8. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

9. *Press-Enterprise Co. v. Sup. Ct. (Press-Enterprise II)*, 478 U.S. 1 (1986). This case is referred to later in this article as *Press-Enterprise II* in order to distinguish it from the U.S. Supreme Court's 1984 ruling in the case of *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), which is dubbed *Press-Enterprise I*. In *Press-Enterprise I*, the Court held that the *voir dire* process in criminal cases is presumptively open. It reasoned, in relevant part, that “[t]he

proceedings,¹⁰ makes finding an access right in cases like that of Joseph Wood exceedingly difficult.¹¹

Slated to die by lethal injection on July 23, 2014, Wood went to federal court seeking an injunction stopping his execution until the Arizona Department of Corrections (ADC) and its director, Charles Ryan, produced to him the following data:

[T]he source(s), manufacturer(s), National Drug Codes (NDCs), and lot numbers of the drugs Defendants intend to use in his execution; non-personally-identifying information detailing the medical, professional, and controlled-substances qualifications and certifications of the personnel Defendants intend to use in his execution; and information and documents detailing the manner in which Defendants developed their lethal-injection drug protocol.¹²

Wood argued that the ADC's and Ryan's refusal to produce this information violated a First Amendment "right of access to governmental proceedings."¹³ Wood's motion, as explained later in more detail,¹⁴ was rejected on July 10, 2014, by U.S. District Judge Neil Wake.¹⁵ Just nine days later, however, a three-judge panel of the Ninth Circuit reversed Wake's ruling in a split, two-to-one decision.¹⁶ It marked the first recognition ever by a federal appellate court of a First Amendment right to know details about the source of execution drugs.¹⁷

Two days later, with the clock quickly ticking toward Wood's execution, a divided Ninth Circuit denied the ADC's and Ryan's petition

presumptive openness of the jury selection process in England, not surprisingly, carried over into proceedings in colonial America." *Id.* at 508.

10. The two parts of this test relate to the "experience and logic" of requiring access. *Press-Enterprise II*, 478 U.S. at 9. These are deemed "complementary considerations." *Id.* at 8. The experience component examines "whether the place and process have historically been open to the press and general public." *Id.* The logic prong, in turn, evaluates "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

11. *Infra* Part III (describing the application of the *Press-Enterprise II* test in three cases involving requests for access in 2014 to detailed data about lethal injections).

12. *Wood v. Ryan*, 2014 U.S. Dist. LEXIS 94412, at *6 (D. Ariz. July 10, 2014), *rev'd*, 759 F.3d 1076 (9th Cir. 2014).

13. *Id.* at *7.

14. *Infra* Part III, Section A.

15. *Wood v. Ryan*, 2014 U.S. Dist. LEXIS 94412, at *20.

16. *Wood*, 759 F.3d 1076.

17. See Erik Eckholm, *Court Delays Execution Over Secrecy with Drugs*, N.Y. TIMES, July 21, 2014, at A11 (quoting Jennifer Moreno of the Death Penalty Clinic at the University of California, Berkeley, for the proposition that "this is the first time a circuit court has ruled that the plaintiff has a right to know the source of execution drugs").

for a rehearing en banc.¹⁸ That refusal prompted Judge Kozinski's dissent quoted at the start of this article.¹⁹ Kozinski passionately added that executions "are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf."²⁰ Nonetheless, he predicted the U.S. Supreme Court would overrule the Ninth Circuit's decision and, in turn, allow Wood's execution to proceed as scheduled.²¹

Indeed, on July 22, 2014—just one day before Wood's planned execution—the Supreme Court vacated the Ninth Circuit's preliminary injunction.²² The high court cursorily explained that "[t]he district judge did not abuse his discretion in denying Wood's motion for a preliminary injunction. Judgment of the United States Court of Appeals for the Ninth Circuit reversing the district court and granting a conditional preliminary injunction vacated."²³

Ultimately, Wood's death the next day apparently proved every bit as brutal and excruciating as Chief Judge Kozinski proclaimed executions inherently are.²⁴ In fact, it took nearly two full hours for Wood to die²⁵—far longer than the average²⁶ of about nine minutes.²⁷ Furthermore, some witnesses claimed the procedure "left Wood gasping for air,"²⁸ and

18. *Wood*, 759 F.3d 1076.

19. *See supra* note 1 and accompanying text.

20. *Wood*, 759 F.3d at 1103.

21. *See id.* at 1102 ("I have little doubt that the Supreme Court will thwart this latest attempt to interfere with the State of Arizona's efforts to carry out its lawful sentence and bring Wood to justice for the heinous crimes he committed a quarter century ago.")

22. *Ryan v. Wood*, 135 S. Ct. 21 (2014).

23. *Id.* at 21.

24. *See supra* note 1 and accompanying text.

25. *See* Matt Pearce et al., *Execution Takes Two Hours*, L.A. TIMES, July 24, 2014, at AA1 (noting that Wood "received an injection at 1:52 p.m.," and reporting that the injection procedure "became so prolonged that reporters witnessing the execution counted several hundred of his wheezes before he was finally declared dead at 3:49 p.m.—nearly two hours after the procedure began").

26. *See* David Biello, *Bad Drugs: Lethal Injection Does Not Work as Designed*, SCI. AM. (Apr. 23, 2007), <http://www.scientificamerican.com/article/lethal-injection-does-not-work-as-designed> ("In North Carolina inmates took an average of nine minutes to die (and much longer before flawed drug protocols were changed), and in California cessation of the heartbeat took from two to eight minutes after the last injection of the heart-stopping potassium chloride."); Matt Pearce, *I Don't Think He's Going to Die*, L.A. TIMES, July 25, 2014, at A1 ("Some lethal injection executions succeed within 10 minutes.")

27. *See* Arif Kahn & Robyn M. Leventhal, *Medical Aspects of Capital Punishment Executions*, 47 J. FORENSIC SCI. 1, 3 (2002) (noting that lethal injections took an average of 8.4 minutes).

28. Miranda Rivers, *Lethal-Injection Drug Registration is Renewed*, ARIZ. DAILY STAR (Tucson), Sept. 7, 2014, at C4.

“[s]everal reporters on the scene agreed with one of Wood’s lawyers that Wood was gasping and snorting for more than an hour.”²⁹ The *Baltimore Sun* reported that “[i]t took so long for Wood to die after receiving an injection of midazolam combined with hydromorphone that his attorneys had time to file an emergency appeal asking officials to save his life as the drugs apparently failed to fully take hold.”³⁰ In fact, Wood’s lawyers “even called Justice Anthony M. Kennedy of the United States Supreme Court.”³¹

Although the ADC vehemently disputed accusations that Wood’s execution was “botched,”³² the editors of the *Los Angeles Times* bluntly opined in its aftermath that “death penalty protocols should not be kept secret.”³³ Gene Policinski, vice president and executive director of the First Amendment Center, added that although “the First Amendment won’t settle the controversy over the death penalty,” “the core freedoms it protects can provide the means for the self-governed to effectively debate and decide issues facing our nation.”³⁴ Cassandra Stubbs, director of the American Civil Liberties Union’s Capital Punishment Project, concurred that “[i]nstead of hiding lethal injection under layers of foolish secrecy, these states need to show us where the drugs are coming from.”³⁵

29. Bob Egelko, *Botched Executions Spark Judge’s Call for Firing Squad*, S.F. CHRON., July 25, 2014, at A1.

30. Matt Pearce et al., *Attorneys File Appeal as Inmate Slowly Dies*, BALT. SUN, July 24, 2014, at 7A.

31. Erik Eckholm, *Arizona Takes Nearly Two Hours to Execute Inmate*, N.Y. TIMES, July 24, 2014, at A1.

32. The Arizona Department of Corrections issued a statement the day after Wood’s death that asserted, in relevant part, that:

Media reports, some of which were made prior to any information officially being released on the day of the execution, reached the premature and erroneous conclusion that this execution was ‘botched’. This is pure conjecture because there is no medical or forensic evidence to date that supports that conclusion.

In fact, the evidence gathered thus far supports the opposite. The IV team, which includes a licensed medical doctor, verified multiple times during the procedure that the inmate was comatose and never in pain. The record clearly shows the inmate was fully and deeply sedated beginning at 1:57 PM – three minutes after the administration of the execution drugs – until he was declared deceased at 3:49 PM.

Press Release, Arizona Dep’t of Corrections, Department of Corrections Statement on Review of July 23 Execution (July 24, 2014), <https://corrections.az.gov/article/depart-ent-corrections-statement-review-july-23-execution>.

33. Editorial, *Misery of Mis-Executions*, L.A. TIMES, July 25, 2014, at A20.

34. Gene Policinski, *Seeking the Ultimate ‘Redress of Grievances’*, TENNESSEAN (Aug. 10, 2014), <http://www.tennessean.com/story/opinion/columnists/2014/08/11/seeking-ultimate-redress-grievances/13866547>.

35. Press Release, ACLU, Arizona Botches Execution, Imposes Cruel and Unusual Punishment on Joseph Wood (July 23, 2014), <https://www.aclu.org/print/capital-punishment/arizona-botches-execution-imposes-cruel-and-unusual-punishment-joseph-wood>.

The importance of the question of establishing a First Amendment right of access to the details of death penalty facts and procedures that Policinski and Stubbs intimate goes well beyond Wood's case. As the *Washington Post* reported, his death occurred "just months after a botched execution in Oklahoma."³⁶ In that case, "rather than dying from lethal injection, Clayton Lockett died of a heart attack 40 minutes after the first of the drugs had been administered."³⁷ Indeed, as the *New York Times* wrote, "Wood's execution was the fourth troubled one" in 2014.³⁸

Critically, the Ninth Circuit was not the only appellate court in 2014 to consider an issue like that in *Wood v. Ryan*. In June of that year, the U.S. Court of Appeals for the Eleventh Circuit in *Wellons v. Commissioner*³⁹ rebuffed the argument of convicted rapist and murderer Marcus A. Wellons that "the dearth of information regarding the nature of the pentobarbital that will be used in his execution and the expertise of those who will carry it out violates the First Amendment."⁴⁰ The Eleventh Circuit agreed with the district court's conclusion (and the Georgia Department of Corrections' argument) that "while there may be First Amendment implications involved in the openness of government operations, the cases Wellons relies upon turn on the public's, rather than the individual's, need to be informed so as to foster debate."⁴¹

Additionally, the Supreme Court of Georgia, in May 2014 in *Owens v. Hill*,⁴² considered the constitutionality of Georgia's refusal to reveal information to convicted murderer Warren Lee Hill, who was sentenced to death. Hill sought "the names and other identifying information of the persons and entities involved in executions, including those who manufacture the drug or drugs to be used."⁴³ The Georgia high court rejected Hill's First Amendment-based access argument, finding "a longstanding tradition of concealing the identities of those who carry out those executions."⁴⁴ The court reasoned that, in light of privacy concerns

36. Mark Berman, *Execution Takes Nearly Two Hours*, WASH. POST, July 24, 2014, at A3.

37. Editorial, *Horror Stories in the Death Chamber*, SUNDAY NEWS (Lancaster, Pa.), July 27, 2014, at P2.

38. Fernanda Santos & John Schwartz, *A Prolonged Execution in Arizona Leads to a Temporary Halt*, N.Y. TIMES (July 25, 2014), <http://www.nytimes.com/2014/07/25/us/a-prolonged-execution-in-arizona-leads-to-a-temporary-halt.html>.

39. 754 F.3d 1260 (11th Cir. 2014).

40. *Id.* at 1267.

41. *Id.* at 1266. The appellate court cited the following cases upon which Wellons apparently relied in his First Amendment argument: *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise II*, 478 U.S. 1 (1986); *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868 (9th Cir. 2002); and *Pell v. Procunier*, 417 U.S. 817 (1974).

42. 758 S.E.2d 794 (Ga.), *cert. denied*, 135 S. Ct. 449 (2014).

43. *Id.* at 796.

44. *Id.* at 805.

and protecting those involved in performing executions from harassment and retaliation, keeping secret the names of executioners was justified.⁴⁵ The court added that while “the executioner who actually inflicts death upon the prisoner is the most obvious party in need of such protection, we believe that the same logic applies to the persons and entities involved in making the preparations for the actual execution, including those involved in procuring the execution drugs.”⁴⁶ In November 2014, the U.S. Supreme Court passed on the opportunity to hear the case.⁴⁷

All of this judicial jockeying occurs just as “public support for the death penalty, though still high, has been falling.”⁴⁸ A Gallup poll conducted in October 2014 found that 63% of those surveyed favored the death penalty for individuals convicted of murder—a figure far lower than the high of 80% in 1994.⁴⁹ A 2013 survey conducted by the Pew Research Center found that while 55% of Americans “said they favored the death penalty for convicted murderers, that was the lowest support level in four decades; support has been falling for the past two decades.”⁵⁰

Furthermore, the odds of malfunction during a lethal injection may be higher today. That is partly because the American Board of Anesthesiology now takes the “position that an anesthesiologist should not participate in an execution by lethal injection and that violation of this policy is inconsistent with the Professional Standing criteria required for ABA Certification and Maintenance of Certification in Anesthesiology or any of its subspecialties.”⁵¹ As Professor Deborah Denno explains, the paradox is that “[t]he people most knowledgeable about the process of lethal injection—doctors, particularly anesthesiologists—are often reluctant to impart their insights and skills.”⁵² In another article, Denno puts it far more bluntly: “legislatures delegate death to prison personnel and executioners who are not qualified to devise a lethal-injection protocol,

45. *Id.*

46. *Id.*

47. *Hill v. Owens*, 135 S. Ct. 449 (2014).

48. Moshik Temkin, *How to Kill the Death Penalty*, L.A. TIMES, May 27, 2014, at A13.

49. *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Oct. 20, 2015).

50. Drew DiSilver, *Botched Execution in Oklahoma Renews Death Penalty Debate*, PEW RESEARCH CTR. (Apr. 30, 2014), <http://www.pewresearch.org/fact-tank/2014/04/30/botched-execution-in-oklahoma-renews-death-penalty-debate>.

51. Commentary, *Anesthesiologists and Capital Punishment*, AM. BD. OF ANESTHESIOLOGY (May 2014), <http://www.theaba.org/pdf/CapitalPunishmentCommentary.pdf>.

52. Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 53 (2007).

much less carry one out.”⁵³ Boer Deng and Dahlia Lithwick encapsulated well this aspect of the problem in *Slate* in May 2014:

[I]t’s clear that the reason lethal injection has become more gruesome and violent in recent years is at least partly a result of opposition to the death penalty. Lethal injection was supposed to be the humane alternative to firing squads and hangings. But as American physicians sideline themselves and European pharmaceutical firms (and American ones with global ties) decline to supply the most known and efficacious lethal-injection drugs, corrections officials have been pushed to use inferior methods and substandard providers.⁵⁴

Perhaps most significantly, the U.S. Supreme Court in January 2015 granted a petition for a writ of certiorari in *Glossip v. Gross*.⁵⁵ There, the Court will consider a trio of questions related to the constitutionality of lethal-injection drug protocols and Eighth Amendment⁵⁶ concerns of cruel and unusual punishment.⁵⁷ As the *Los Angeles Times* put it shortly after the Court granted certiorari, “[s]ome of the justices have been eager to act after a year in which three executions in three states had serious problems, with inmates seeming to suffer while being put to death.”⁵⁸ Lethal injections are now squarely caught in both the judicial and public crosshairs.

This article, bridging First Amendment doctrine with theory, examines whether the First Amendment should provide a right of access for both death-sentenced defendants and the public to obtain detailed information regarding the implementation of lethal injections. Part II initially provides a brief primer on the two-part doctrine typically applied by courts to

53. Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocuting and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 66 (2002).

54. Boer Deng & Dahlia Lithwick, *Liberal Guilt: In the Push to Abolish the Capital Punishment, Opponents of the Death Penalty Have Made It Less Safe*, SLATE (May 9, 2014, 5:14 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/death_penalty_in_america_how_the_push_to_abolish_capital_punishment_has.html.

55. 135 S. Ct. 1173 (Jan. 23, 2015).

56. The Eighth Amendment to the U.S. Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST., amend. VIII. The cruel and unusual punishment clause has been incorporated through the Fourteenth Amendment to apply to the states. *Furman v. Georgia*, 408 U.S. 238, 239–240 (1972).

57. See Questions Presented, *Glossip v. Gross*, No. 14-7955, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/qp/14-07955qp.pdf> (last visited Oct. 20, 2015) (setting forth the three questions in the case).

58. Michael Muskal, *Back Story: Reviewing Executions*, L.A. TIMES, Jan. 25, 2015, at A2.

determine if the First Amendment provides a qualified right of access to certain governmental proceedings.⁵⁹ It also notes how some courts are stretching this right beyond the confines of courtrooms and judicial proceedings. Part III then examines how courts in the abovementioned trio of 2014 cases—*Wood*, *Wellons*, and *Hill*—applied variations of this doctrine when analyzing the issue of access to facts about lethal-injection drugs, personnel and procedures.⁶⁰

Next, Part IV moves beyond the First Amendment doctrinal issues to the realm of free speech theory from which those doctrines spring.⁶¹ Specifically, it explores how three venerable theories of free expression support expanding the doctrine to include a right to such information.⁶² Finally, Part V concludes by asserting that the U.S. Supreme Court should grant certiorari in a future death-by-lethal-injection case and, in turn, resolve the issue by moving beyond the narrow confines of the *Press-Enterprise II* doctrine⁶³ to recognize that First Amendment theory demands access to more detailed data regarding lethal injections.⁶⁴

II. First Amendment Doctrine on Public Access Rights: From Courtrooms to Executions to Horse Round-Ups

This part initially provides, in Section A, a brief overview of the two-part test the U.S. Supreme Court applies for determining if the public possesses a First Amendment right of access to certain judicial proceedings. Section A does so because, as Part III later makes clear, the courts in the death-by-lethal-injection cases of 2014 all applied some variation of it. Section B then describes how some courts are willing to expand a First Amendment right of access beyond courtrooms to other proceedings, including the right to witness executions.

A. The Experience and Logic Test

In *Press-Enterprise II*,⁶⁵ the U.S. Supreme Court in 1986 fashioned what Professor Raleigh Hannah Levine describes as a “two-pronged

59. *Infra* notes 65-136 and accompanying text.

60. *Infra* notes 137-244 and accompanying text.

61. See Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 153, 153 (Lee C. Bollinger & Geoffrey R. Stone eds. 2002) (“First Amendment doctrine veers between theory and the exigencies of specific cases. The function of doctrine is both to implement the objectives attributed by theory to the Constitution and to offer principled grounds of justification for particular decisions.”).

62. *Infra* notes 245-279 and accompanying text.

63. *Supra* text accompanying note 9.

64. *Infra* notes 280-304 and accompanying text.

65. 478 U.S. 1 (1986).

experience and logic pre-test as the standard by which to determine whether a particular criminal proceeding [is] presumptively open.”⁶⁶ Often referred to simply as *Press-Enterprise II*,⁶⁷ the case centered on whether a Southern California-based newspaper possessed a First Amendment right of access to the transcript of a 41-day preliminary hearing in the prosecution of a man charged with multiple counts of murder.⁶⁸

In concluding that a “qualified First Amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California,”⁶⁹ Chief Justice Warren Burger wrote for the majority that a qualified right of access exists in light of “two complementary considerations.”⁷⁰ Under the first consideration, the Court must consider “whether the place and process have historically been open to the press and general public.”⁷¹ Under the second factor, the Court evaluates “whether public access plays a significant positive role in the functioning of the particular process in question.”⁷² Burger noted the nexus between these two prongs of the test, writing that “these considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes.”⁷³

Importantly, satisfying this test only establishes a qualified, rather than absolute, First Amendment right of access to a judicial proceeding. To overcome the right and to limit public and press access:

[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the hearing, and it must make findings adequate to support the closure.⁷⁴

Courts have applied this standard to various types of courtroom proceedings, including trials involving juvenile defendants.⁷⁵ For instance, in *United States v. Three Juveniles*⁷⁶ the U.S. Court of Appeals for the First

66. Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739, 1755 (2006).

67. See *supra* note 9 (describing why the case is referred to as *Press-Enterprise II*).

68. *Press-Enterprise II*, at 3–5.

69. *Id.* at 13.

70. *Id.* at 8.

71. *Id.*

72. *Id.*

73. *Id.* at 9.

74. *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984).

75. *United States v. Three Juveniles*, 61 F.3d 86 (1st Cir. 1995).

76. *Id.*

Circuit upheld the district court's decision to close the proceedings in accordance with section 5038 of the Federal Juvenile Delinquency Act⁷⁷ and the defendants' request.⁷⁸ As the First Circuit framed the standard to overcome the presumption of access in *Three Juveniles*, "reviewing courts must determine whether the closure is 'essential to preserve higher values' and 'narrowly tailored to serve that interest.'"⁷⁹ Despite the "presumption of openness"⁸⁰ of voir dire proceedings in criminal cases, the high "overriding interest"⁸¹ standard required by *Press-Enterprise I* to curtail the qualified right of access was satisfied by the need to protect "juvenile[s] from the stigma of a criminal record."⁸²

The U.S. Court of Appeals for the Fourth Circuit explained in 2004 that "[t]he burden to overcome a First Amendment right of access rests on the party seeking to restrict access, and that party must present specific reasons in support of its position."⁸³ In particular, the party seeking closure must prove the existence of a "compelling governmental interest" and that the order is "narrowly tailored to serve that interest."⁸⁴ This mirrors the rigorous strict scrutiny standard against which the constitutionality of content-based restrictions on speech are measured.⁸⁵

In summary, as Professor Cathy Packer writes, "courts now use what has come to be known as the 'experience and logic' test to determine which judicial proceedings must be open."⁸⁶ The seeds of this test and the right of public access evolved from the Supreme Court's 1980 decision in *Richmond Newspapers, Inc. v. Virginia*,⁸⁷ involving "the right of the public

77. 18 U.S.C. § 5038 (1995).

78. *Three Juveniles*, 61 F.3d at 92–93.

79. *Id.* at 88 (citing *Press-Enterprise I*, 464 U.S. at 510).

80. *Id.* (citing *Press-Enterprise I*, 464 U.S. at 508–10).

81. *Press-Enterprise I*, 464 U.S. at 510.

82. *Three Juveniles*, 61 F.3d at 88.

83. *Va. Dep't State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004).

84. *Id.*

85. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (asserting that because a California law limiting minors' access to violent video games "imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest"); see also *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000) (asserting that a content-based speech restriction can only stand judicial review "if it satisfies strict scrutiny," opining that "[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest," and adding that "if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative").

86. Cathy Packer, *Should Courtroom Observers Be Allowed to Use Their Smartphones and Computers in Court? An Examination of the Arguments*, 36 AM. J. TRIAL ADVOC. 573, 575 (2013).

87. 448 U.S. 555 (1980).

and press to attend criminal trials.”⁸⁸ Today, however, “federal courts of appeals have widely agreed that it extends to civil proceedings and associated records and documents.”⁸⁹

However, Professor Barry McDonald of Pepperdine University points out that the public right of access “has been relatively dormant at the Supreme Court level.”⁹⁰ McDonald attributes that inactivity, in part, to the “daunting task of determining the scope of such a right.”⁹¹ Initially, the Court appeared to “carefully limit”⁹² its application to criminal trial proceedings. Over time, however, many lower courts recognized a right of access to civil and criminal trials, as well as to records and documents associated with those trials.⁹³ The Supreme Court’s failure to sufficiently address the issue has led to mishandlings of the experience and logic test among the lower courts.

Attorneys Myron Steele and Peter Tslofias assert that implementation of the experience and logic test by lower courts beyond criminal trial settings demonstrates a “drastic departure from the United States Supreme Court’s ‘experience and logic’ jurisprudential standard.”⁹⁴ Because the public right to access “is theoretically endless . . . it must be invoked with discrimination and temperance.”⁹⁵ Failure to employ such measured judgment results in lower courts using their own discretion to deem “what is ‘good,’ ‘desirable,’ or ‘expedient’ as opposed to ‘what is constitutionally commanded by the First Amendment.’”⁹⁶

Furthermore, courts subjectively and inconsistently evaluate the history/experience prong of the test due to the absence of a narrow definition. For example, the Committee on Communications and Media Law of the Association of the Bar of the City of New York pointed to *Society of Professional Journalists v. Secretary of Labor*,⁹⁷ an

88. *Id.* at 558.

89. *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014).

90. Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 328 (2004).

91. *Id.* at 296.

92. *Id.* (citing *Press-Enterprise II*, 478 U.S. 1, 8–10 (1986)).

93. *Id.* at 304. *See, e.g.*, *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 n.11 (6th Cir. 2002) (explaining that several circuits have agreed that access to civil trials is presumptively open); *In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002) (extending the qualified right of access to court documents in criminal proceedings).

94. Myron T. Steele & Peter I. Tsollias, *Realigning with the Constitutional Pendulum*, 77 ALB. L. REV. 1365, 1382 (2013).

95. *Id.* at 1381 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588 (1980)).

96. *Id.* at 1381–82.

97. 616 F. Supp. 569 (D. Utah 1985).

administrative agency hearing.⁹⁸ Applying the experience and logic test, “the court found ‘little historical tradition.’”⁹⁹ Using its discretion, the court instead opted to examine “‘analogous’ civil trials.”¹⁰⁰ Evaluating the “broad spectrum of administrative hearings, rather than narrow instances,” produced a tradition of openness.¹⁰¹ Such jurisprudential murkiness makes it difficult to confidently predict what constitutes a tradition of historical openness.

B. Moving the Right Beyond the Courtroom

In a 2013 article, Professor Matthew Bunker describes “a small but significant body of case law” that illustrates what he calls “the creative expansion by some lower courts of a First Amendment right of access originally intended for entry to judicial proceedings and courtrooms into the much broader arenas of access involving other branches and agencies of government.”¹⁰² This section provides an overview of some of those judicial reaches beyond the confines of courtrooms. Such judicial extensions beyond courtrooms are relevant for purposes of this article because they indicate that some courts may, in fact, be willing to extend access rights to detailed data requests regarding lethal-injection drugs, personnel, and procedures.

Significantly, part of this jurisprudence of access expansion relates to executions. For instance, in 2012 the U.S. Court of Appeals for the Ninth Circuit in *Associated Press v. Otter*¹⁰³ declared it “settled law,”¹⁰⁴ at least within that circuit and dating back to a 2002 decision,¹⁰⁵ that “the public enjoys a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber, including those ‘initial procedures’ that are inextricably intertwined with the process of putting the condemned inmate to death.”¹⁰⁶ Also in 2012, a federal court in Pennsylvania applied the experience and logic test to find a public right to

98. Committee on Communications and Media Law of the Association of the Bar of the City of New York, “*If It Walks, Talks and Squawks . . . The First Amendment Right of Access to Administrative Adjudications: A Position Paper*,” 23 CARDOZO ARTS & ENT. L.J. 21, 50 (2005) [hereinafter “Committee on Communications”].

99. *Id.* (citing *Soc’y of Prof’l Journalists*, 616 F. Supp. at 575–76).

100. *Soc’y of Prof’l Journalists*, 616 F. Supp. at 575.

101. *Committee on Communications*, *supra* note 98, at 50 (citing *Soc’y of Prof’l Journalists*, 616 F. Supp. at 575–576).

102. Matthew D. Bunker & Clay Calvert, *Could Wild Horses Drag Access Away From Courtrooms? Expanding First Amendment Rights to New Pastures*, 18 COMM. L. & POL’Y 247, 249 (2013).

103. 2012 U.S. App. LEXIS 12128 (9th Cir. June 8, 2012).

104. *Id.* at *1.

105. *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868 (9th Cir. 2002).

106. *Otter*, 2012 U.S. App. LEXIS 12128, at *1 (quoting *Woodford*, 299 F.3d at 877).

witness executions in the Keystone State.¹⁰⁷ The court noted that “permitting the press to witness all phases of the execution contributes to the proper functioning of the execution process, in part because it allows the press to contribute to an informed discussion of the Commonwealth’s lethal-injection procedures.”¹⁰⁸

On the other hand and more recently, an Oklahoma federal district court in December 2014 rejected the arguments of several news media organizations that there is a First Amendment right “to view and hear the entire execution process from beginning to end, which they describe[d] as the time from when the inmate to be executed enters the execution chamber until he leaves the chamber, dead or alive.”¹⁰⁹ In rebuffing this argument, the court emphasized that the U.S. Supreme Court had never granted a First Amendment right of access “outside the criminal adjudication process.”¹¹⁰ Additionally, the U.S. Court of Appeals for the Eighth Circuit held in 2004 “that neither the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public,”¹¹¹ including executions.

Expansion of First Amendment access rights can be found in a few settings other than execution chambers and their viewing rooms. For example, in 2013 a federal district court in Nevada applied the *Press-Enterprise II* test and found that wild horse gathers conducted by the federal Bureau of Land Management “have historically been and remain open to the press and general public, and public access plays a significant positive role in the function of gather activities. As such, the public has a right of access to gathers upon public lands.”¹¹² The court noted that the evidence “establishes that public access to gather activities plays an important role in the function of the gather, namely protecting the interests of the overpopulated horses and news gathering for the benefit of the public.”¹¹³

In *Delaware Coalition for Open Government, Inc. v. Strine*,¹¹⁴ the U.S. Court of Appeals for the Third Circuit in 2013 considered whether a public right of access exists for arbitration proceedings under Delaware’s state-sponsored arbitration program.¹¹⁵ The appellate court found, after

107. *Phila. Inquirer v. Wetzel*, 906 F. Supp. 2d 362 (M.D. Pa. 2012).

108. *Id.* at 371.

109. *Okla. Observer v. Patton*, 73 F. Supp. 3d 1318 (W.D. Okla. 2014).

110. *Id.* at 1324.

111. *Rice v. Kempker*, 374 F.3d 675, 678 (8th Cir. 2004).

112. *Leigh v. Salazar*, 954 F. Supp. 2d 1090, 1101 (D. Nev. 2013).

113. *Id.*

114. 733 F.3d 510 (3d Cir. 2013).

115. *Id.* at 512.

applying the *Press-Enterprise II* experience and logic test, that the press and general public had access to both the “place and process” of arbitration proceedings.¹¹⁶ A major point of contention between the parties in *Strine* centered on which “history” under the experience prong was relevant—a narrow look at “the history of arbitrations”¹¹⁷ or a broad examination of “the history of civil trials.”¹¹⁸ The Third Circuit ultimately decided that both required examination.¹¹⁹ In doing so, it determined that:

[T]he right of access to government-sponsored arbitrations is deeply rooted in the way the judiciary functions in a democratic society. Our experience inquiry therefore counsels in favor of granting public access to Delaware’s proceeding because both the “place and process” of Delaware’s proceeding “have historically been open to the press and general public.”¹²⁰

Furthermore, the Third Circuit reasoned that permitting access helps to “ensure accountability and allow the public to maintain faith in the Delaware judicial system,”¹²¹ overshadowing the “comparatively less weighty”¹²² potential harms of disclosure. In March 2014, the U.S. Supreme Court denied a petition for writ of certiorari in *Strine*,¹²³ thus leaving the Third Circuit’s decision intact.

In *Cal-Almond, Inc. v. U.S. Department of Agriculture*,¹²⁴ the Ninth Circuit applied the experience and logic test to decide if Cal-Almond could access a list of almond growers eligible to vote in a referendum on the continuation of a marketing order.¹²⁵ By finding a history of state statutes explicitly allowing such access¹²⁶ and concluding that public access would “play a significant positive role in the functioning of any referendum, including this one,”¹²⁷ the appellate court held that Cal-Almond satisfied the test.¹²⁸ While the court ruled in favor of Cal-Almond, “the Ninth Circuit did not fully reach the merits of the constitutional access

116. *Id.* at 518 (citing *Press-Enterprise II*, 478 U.S. 1, 8 (1986)).

117. *Id.* at 515.

118. *Id.*

119. *Id.* at 516.

120. *Id.* at 518.

121. *Id.*

122. *Id.*

123. *Strine v. Del. Coal. for Open Gov’t*, 134 S. Ct. 1551 (2014).

124. 960 F.2d 105 (9th Cir. 1992).

125. *Id.* at 106–07.

126. *Id.* at 109.

127. *Id.*

128. *Id.* at 110.

question”¹²⁹ as the constitutional avoidance doctrine resulted in the court “interpreting a federal statute to allow access”¹³⁰ instead.

Administrative proceedings also have seen right to access claims, relying on the experience and logic test for evaluation.¹³¹ As Professor Levine notes, judicial treatment of these claims is “inconsistent and contradictory.”¹³² Cases with similar facts have produced split decisions, with some courts finding the test satisfied and others finding it unmet.¹³³ Furthermore, some courts have opined that the experience and logic test “should not be applied to administrative proceedings at all.”¹³⁴ The U.S. Court of Appeals for the Fifth Circuit, for instance, has suggested that applying the test outside the context “of criminal court proceedings is ‘questionable.’”¹³⁵ Additionally, the U.S. Court of Appeals for the Third Circuit has expressed doubts about “whether the access right can attach outside the limited context of historically-open court proceedings.”¹³⁶ Although the right to access, viewed through the lens of the experience and logic test, is expanding, it is obvious that the understanding of just how far it reaches and where it can be applied is muddled at best.

In summary, some courts have expanded the right of access beyond the narrow confines of courtrooms, ensuring openness where it historically has resided and rationally belongs. The willingness to expand access in such cases, particularly the Ninth Circuit rulings involving access to executions, bodes well for those now seeking to stretch a First Amendment right of access to encompass data about lethal-injection drugs, procedures, and personnel. The next part of this article thus examines three cases from 2014 involving that precise issue.

III. The Lethal-Injection Access Cases of 2014: Different Applications of the Press-Enterprise II Test

This part features three sections, each of which examines one of the three cases from 2014 involving a request by a death-sentenced inmate for access to detailed information about his scheduled execution by lethal injection. In only one of these cases—namely, the Ninth Circuit’s decision in *Wood v. Ryan*—did a court recognize a First Amendment-based right of access to such data. More analysis is devoted below to *Wood*.

129. Bunker & Calvert, *supra* note 102, at 254.

130. *Id.*

131. Levine, *supra* note 66.

132. *Id.* at 1759.

133. *Id.*

134. *Id.* at 1770.

135. *Calder v. IRS*, 890 F.2d 781, 783 (5th Cir. 1989).

136. Levine, *supra* note 66, at 1770.

A. *Wood v. Ryan*¹³⁷

As noted in the Introduction, *Wood* centered on a First Amendment-based access request by double-murderer Joseph Rudolph Wood III for information relating to the drugs and procedures that would be used in his then-pending execution by lethal injection.¹³⁸ Specifically, Wood requested data such as the names of manufacturers and lot numbers of the drugs by which the Arizona Department of Corrections (ADC) planned to kill him, as well as the medical credentials and qualifications of the individuals who would administer his execution.¹³⁹

At the trial court level, U.S. District Judge Neil Wake readily and initially acknowledged two key facts: The existence of “a First Amendment right of public access to governmental proceedings”¹⁴⁰ and the Ninth Circuit’s recognition in *California First Amendment Coalition v. Woodford*¹⁴¹ that the public has a “First Amendment right to view executions from the moment the condemned is escorted into the execution chamber.”¹⁴²

To analyze Wood’s request, Judge Wake then applied the two-part experience and logic test, which is described in greater detail in Part II, Section A, for access to governmental proceedings.¹⁴³ Under this doctrine, courts consider both if there is a history and tradition of openness to the proceeding or information and “whether public access plays a significant positive role in the functioning of the particular process in question.”¹⁴⁴

Judge Wake found that Wood offered “no authority for the proposition that the press and general public have historically been granted access to information identifying the manufacturer of lethal-injection drugs.”¹⁴⁵ The judge also rejected Wood’s contention “that information identifying the manufacturer of the lethal-injection drugs is necessary to the public debate about the death penalty.”¹⁴⁶ Wake reasoned here that the ADC already had disclosed to Wood the “type of drug, the dosage to be used, and the

137. 759 F.3d 1076 (9th Cir.), *vacated*, 135 S. Ct. 21 (2014).

138. *Supra* notes 3 and 4, 12-31 and accompanying text.

139. *See supra* note 12 and accompanying text (setting forth the precise data sought by Wood).

140. *Wood v. Ryan*, 2014 U.S. Dist. LEXIS 94412, at *9 (D. Ariz. July 10, 2014), *rev’d*, 759 F.3d 1076 (9th Cir. 2014).

141. 299 F.3d 868 (9th Cir. 2002).

142. *Id.* at 870–871.

143. The test is sometimes referred to as the history and logic test. *See generally* Mary-Rose Papandrea, *Under Attack: The Public’s Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35, 46–47 (2005) (providing a brief overview of the history-and-logic test).

144. *Press-Enterprise II*, 478 U.S. 1, 8 (1986).

145. *Wood v. Ryan*, 2014 U.S. Dist. LEXIS 94412, at *15.

146. *Id.* at *15–16.

expiration dates, as well as the fact that the drugs are domestically-obtained and FDA-approved.”¹⁴⁷ Judge Wake refused to stretch the Ninth Circuit’s ruling in *Woodford* to the case at bar, reasoning that *Woodford* “specifically addressed a public right to view the execution process. That principle does not expand to encompass a First Amendment right to compel the government to disclose information about execution drugs beyond that already provided here.”¹⁴⁸

This reasoning is important because it reveals a dichotomy in Judge Wake’s logic—specifically, one between *witnessing/viewing a process* or proceeding, on the one hand, and *obtaining/possessing data* about the inner workings of that process or proceeding, on the other hand. Put slightly differently, Wake’s analysis suggests a crucial difference between *observation* of a government-performed, government-sanctioned event and *possessing* government-held data about that same event.

Nine days after Wake denied Wood’s motion for a preliminary injunction, however, the Ninth Circuit reversed that decision.¹⁴⁹ In doing so, the two-judge majority applied the same two-part *Press-Enterprise II* test¹⁵⁰ to decide if Wood had raised the requisite “serious questions going to the merits of his First Amendment claim”¹⁵¹ needed to obtain a preliminary injunction.

Critically, on the first prong of the *Press-Enterprise II* standard, the Ninth Circuit majority chose *not* to focus narrowly on whether there was a history of data access to *lethal-injection procedures*.¹⁵² Instead, it initially focused much more broadly “on the historic openness of the execution itself.”¹⁵³ It reasoned here that the data sought by Wood was “inextricably intertwined with the execution.”¹⁵⁴ In other words, the majority seemed to reject Judge Wake’s bright-line distinction described immediately above between observing proceedings (executions, in this case) and accessing information related to those same proceedings.¹⁵⁵ The *Wood* majority quickly concluded, after taking note of long-standing access to executions when they historically were performed in public squares during the middle

147. *Id.* at *16.

148. *Id.* at *16–17.

149. *Wood v. Ryan*, 759 F.3d 1076 (9th Cir.), *vacated*, 135 S. Ct. 21 (2014).

150. *Id.* at 1082–83.

151. *Id.* at 1080.

152. This contrasts directly with Judge Wake’s focus at the trial court level, where he found “no authority for the proposition that the press and general public have historically been granted access to *information identifying of the manufacturer of lethal-injection drugs*.” *Wood v. Ryan*, 2014 U.S. Dist. LEXIS 94412, at *15 (emphasis added).

153. *Wood*, 759 F.3d at 1083.

154. *Id.*

155. *Supra* note 148 and accompanying text.

of the day, that “the broad tradition of a public right of access to executions is indisputable.”¹⁵⁶

The Ninth Circuit then dug deeper on the first prong of *Press-Enterprise II*, delving into the historical question of access to data and information regarding executions generally—not simply those involving lethal injections. Here, it concluded that “important details about early methods of executions were also public,”¹⁵⁷ finding that “public accounts in some states supplied information about both the types of ropes used in hangings and the manufacturers who provided them.”¹⁵⁸ The *Wood* majority reasoned that, historically, “[n]ewspapers reported openly on gas chambers, describing their size, cost, and makeup.”¹⁵⁹

Ultimately, the majority ruled for *Wood* on the first prong of the *Press-Enterprise II* test, concluding:

[Wood] provided evidence that executions in general have long been open to the public, and that information regarding the *methods of execution* and the *qualifications of the executioners* have been open as well. This evidence, at a minimum, raises “serious questions” as to the historical right of access to the information *Wood* seeks.¹⁶⁰

The italicized parts of the above-quoted passage make it evident that the majority focused broadly on executions in general, rather than narrowly on lethal-injection executions. This clearly helped *Wood*, given the relative recency of lethal-injection executions in the United States. It was not, in fact, until 1977 that “Oklahoma pioneered the first lethal-injection protocol.”¹⁶¹ The Sooner State’s three-drug protocol—“thiopental, an ultra-short-acting barbiturate anesthetic; pancuronium bromide, a paralytic inhibiting muscle movement; and potassium chloride, which induces cardiac arrest”¹⁶²—later was adopted during the 1980s and 1990s by thirty-seven states.¹⁶³ Lethal injection now is the most common method of execution, with one law journal article noting that it was used “in 929 of

156. *Wood*, 759 F.3d at 1083.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 1084 (emphasis added).

161. Seema Shah, *How Lethal Injection Reform Constitutes Impermissible Research on Prisoners*, 45 AM. CRIM. L. REV. 1101, 1103 (2008).

162. Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1376 (2014).

163. *Id.*

the 1099 executions in the United States from the re-establishment of the death penalty in 1976 to March 8, 2008.”¹⁶⁴

Turning to the second prong of the *Press-Enterprise II* test, the majority found that Wood “raised serious questions as to the positive role public access to the information he seeks would play in executions.”¹⁶⁵ The court highlighted what it called “a seismic shift in the lethal-injection world in the last five years, as states have struggled to obtain the drug traditionally used in executions, thiopental.”¹⁶⁶ Additionally, it pointed out that several flawed executions in 2014 “sparked public curiosity and debate over the types—and quality—of drugs that should be used in lethal injections.”¹⁶⁷ The *Wood* majority clearly embraced what might be considered a “the-more-information-the-better” approach when it comes to data and details about drugs, drug companies, and executioners.¹⁶⁸ It thus also ruled in favor of Wood on the second prong of the *Press-Enterprise II* standard, concluding he “raised serious questions on the merits as to the positive role that access to lethal-injection drug information and executioner qualifications will have in the public debate on methods of execution.”¹⁶⁹

In dissent, Judge Jay Bybee drew the same proceedings-versus-data dichotomy suggested at the district court level by Judge Wake and addressed earlier in this article.¹⁷⁰ Specifically, Judge Bybee wrote that “[t]he fundamental flaw in Wood’s request for a preliminary injunction is that Wood does not actually assert a right of access to a governmental proceeding. The Supreme Court has long held that the First Amendment does not provide a general right to information in the government’s

164. Teresa A. Zimmers & Leonidas G. Koniaris, *Peer-Reviewed Studies Identifying Problems in the Design and Implementation of Lethal Injection for Execution*, 35 FORDHAM URB. L.J. 919, 920 (2008).

165. *Wood*, 759 F.3d at 1085.

166. *Id.*

167. *Id.*

168. This is illustrated by the following statement from the *Wood* majority:

[M]ore information about the drugs used in lethal injections can help an alert public make better informed decisions about the changing standards of decency in this country surrounding lethal injection. Knowing the source and manufacturer of the drugs, along with the lot numbers and NDCs, allows the public to discern whether state corrections departments are using safe and reliable drug manufacturers. Similarly, knowing the specific qualifications of those who will perform the execution will give the public more confidence than a state’s generic assurance that executions will be administered safely and pursuant to certain qualifications and standards.

Id. at 1085–86.

169. *Id.* at 1086.

170. *Supra* note 148 and accompanying text.

possession.”¹⁷¹ Judge Bybee elaborated on this line of logic, explaining that:

Wood does not seek access to a criminal *proceeding*, nor does he seek documents filed in a proceeding or transcripts of the proceeding. Instead, he wants *information* in the government’s possession; effectively, he has taken the general right of the public to view executions and turned it into a FOIA [Freedom of Information Act] request for documents related to the execution.¹⁷²

Thus far, the analyses of *Wood* at both the district and appellate court levels suggest there are two major doctrinal sticking points for finding a First Amendment right of access—be it a public right or a personal right—to detailed data regarding drugs, procedures, and persons involved in lethal injections.

First, there is a problem on the history/experience prong of *Press-Enterprise II* regarding whether courts should look narrowly at the history of access to lethal injections (a procedure in place in the United States only since 1977) or more broadly at the history of access to executions generally, regardless of their mode.

Second, there is a question regarding whether the dichotomy between access to proceedings/events and access to data/information referred to and recognized by Judge Bybee in his dissent,¹⁷³ but rejected by the majority, is a valid one. Compounding this second problem is the fact that where courts have recognized the existence of a First Amendment right of access to documents, it exists only in “judicial records,”¹⁷⁴ which seemingly would not include records formulated by the ADC and requested in *Wood*.

Two days after the Ninth Circuit granted Wood’s motion for a preliminary injunction, it denied a petition for rehearing en banc.¹⁷⁵ That denial sparked Chief Judge Alex Kozinski’s dissent quoted at the start of this article.¹⁷⁶ Although siding with Judge Bybee’s dissent in the Ninth Circuit’s earlier ruling, Kozinski wrote to express the view that “[a] tremendous number of taxpayer dollars have gone into defending a procedure that is inherently flawed and ultimately doomed to failure. If the

171. *Wood*, 759 F.3d at 1092 (Bybee, J., dissenting).

172. *Id.* at 1093 (Bybee, J., dissenting) (emphasis in original).

173. *Supra* notes 170-72 and accompanying text.

174. *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 290 (4th Cir. 2013).

175. *Wood*, 759 F.3d 1076.

176. *Id.* at 1102-03 (Kozinski, C.J., dissenting).

state wishes to continue carrying out executions, it would be better to own up that using drugs is a mistake and come up with something that will work, instead.”¹⁷⁷

The next day, the U.S. Supreme Court vacated the Ninth Circuit’s preliminary injunction, holding simply that Judge Wake “did not abuse his discretion in denying Wood’s motion for a preliminary injunction.”¹⁷⁸ The Court thus never wrestled (at least in published written form) in any depth whatsoever with Wood’s First Amendment access arguments. As noted in the Introduction, Wood proceeded to die an agonizingly painful death shortly thereafter.¹⁷⁹

B. *Wellons v. Commissioner*¹⁸⁰

In July 2014—the same month the Ninth Circuit decided *Wood v. Ryan*—the U.S. Court of Appeals for the Eleventh Circuit ruled that the First Amendment did not provide Marcus Wellons with an unbridled right to information about the drugs or personnel involved in his impending lethal injection.¹⁸¹ In *Wellons v. Commissioner*, the Georgia Department of Corrections (“GDC”) scheduled Wellons for execution by lethal injection for June 2014.¹⁸²

One year earlier, Georgia had passed the Lethal Injection Secrecy Act (“Secrecy Act”),¹⁸³ which classifies all “identifying information”¹⁸⁴ about the people or entities involved in the manufacture or administration of drugs used in lethal injections as a “confidential state secret.”¹⁸⁵ Georgia, in fact, “is among a number of states that recently passed so-called secrecy laws in an effort to maintain access to lethal-injection drugs, particularly after many drug companies, fearing political backlash, declined to sell them.”¹⁸⁶ In accord with the Secrecy Act, the GDC thus only provided Wellons with a copy of the lethal-injection procedure, which called for a one-drug injection protocol of pentobarbital.¹⁸⁷

177. *Id.* at 1103.

178. *Ryan v. Wood*, 135 S. Ct. 21 (2014).

179. *Supra* notes 25-31 and accompanying text.

180. 754 F.3d 1260 (11th Cir.), *cert. denied*, 134 S. Ct. 2838 (2014).

181. *Id.* at 1267.

182. *Id.* at 1262.

183. O.C.G.A. § 42-5-36(d) (2013).

184. *Id.*

185. *Id.*

186. Richard Fausset, *U.S. Judge Denies Stay of Execution in Georgia*, N.Y. TIMES, June 17, 2014, at A13.

187. *Wellons*, 754 F.3d at 1262.

Wellons challenged the Secrecy Act on two main constitutional grounds—the Eighth and First Amendments.¹⁸⁸ First, Wellons argued that the Eighth Amendment gave him the right to information that would help him ascertain whether the use of pentobarbital is, per the Eighth Amendment’s prohibition, “cruel and unusual.”¹⁸⁹ Because the GDC had not possessed any FDA-approved pentobarbital for more than a year, Wellons reasonably feared the GDC would inject him with a substance that it “purports to be pentobarbital, but that has been manufactured from unknown ingredients and in unknown circumstances by a compounding pharmacy.”¹⁹⁰ The use of this unknown drug would pose an “unacceptable risk of pain, suffering, and harm”¹⁹¹ because compounding pharmacies are not subject to FDA regulation, Wellons averred.¹⁹²

The appellate court reasoned that for Wellons to prevail on his Eighth Amendment claim, he needed to prove that the use of this substance would be “‘sure or very likely to cause serious illness and needless suffering.’”¹⁹³ The court rejected Wellons’ Eighth Amendment challenge as mere speculation.¹⁹⁴

Next, Wellons argued that the First Amendment afforded him the right to details about pentobarbital and its manufacturer because a lethal injection is a “governmental proceeding.”¹⁹⁵ Here, he relied on the *Press-Enterprise II* history/experience and logic test, arguing that, historically and prior to the adoption of the Secrecy Act, the GDC would have provided both him and the public with “detailed information about the drugs used in

188. *Id.* at 1264–67. Wellons also challenged the statute under the Fifth and Fourteenth Amendments, which the court did not discuss at length. *Id.*

189. *Id.* at 1264.

190. *Id.* at 1262.

191. *Id.* at 1264.

192. *Id.* According to the FDA’s website, “compounding” is the process of combining two or more drugs to create a new medication. *Compounding and the FDA: Questions and Answers*, FDA, <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm339764.htm#what> (last visited Mar. 18, 2015). This process is overseen by a licensed medical professional, but compounded drugs are not approved by the FDA. *Id.* Instead, state boards of pharmacy have authority over compounding pharmacies. *Id.* The FDA warns that drugs “made using poor quality practices may be sub- or super-potent, contaminated, or otherwise adulterated.” *Id.*

193. *Wellons*, 754 F.3d at 1265 (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)) (emphasis in original). In *Baze v. Rees*, 553 U.S. 35 (2008), a fractured Supreme Court rejected an Eighth Amendment challenge to Kentucky’s lethal injection protocol. *Id.* at 63. In doing so, it cited “today’s consensus” that lethal injection was the most humane way of conducting an execution. *Id.* at 62.

194. *Wellons*, 754 F.3d at 1265 (citing *Mann v. Palmer*, 713 F.3d 1306, 1315 (11th Cir. 2013)).

195. *Id.* at 1266.

executions.”¹⁹⁶ On the logic prong, Wellons insisted “an informed public debate is critical in determining ‘whether execution by lethal injection comports with the evolving standards of decency which mark the progress of a maturing society.’”¹⁹⁷

The court summarily rejected this argument as well, holding instead that “neither the Fifth, Fourteenth, or First Amendments afford Wellons the broad right ‘to know where, how, and by whom the lethal-injection drugs will be manufactured,’ as well as ‘the qualifications of the person or persons who will manufacture the drugs, and who will place the catheters.’”¹⁹⁸

Although the *Wellons* per curiam opinion did not discuss the overlap between the Eighth and First Amendment challenges, concurring Judge Charles Wilson highlighted the GDC’s hypocrisy and Catch-22 nature of Wellons’ predicament:

I write separately to highlight the disturbing circularity problem created by Georgia’s secrecy law regarding the methods of execution in light of our circuit precedent . . . [Wellons] must show that the manner in which Georgia intends to execute him generates “a substantial risk of serious harm”¹⁹⁹ . . . Possibly due to his lack of information about the compound pentobarbital that will be used and the expertise of the people who will administer his execution, Wellons has not shown such a risk. Indeed, how could he when the state has passed a law prohibiting him from learning about the compound it plans to use to execute him?²⁰⁰

Wilson agreed that Wellons fell short of his Eighth Amendment burden of proof, but feared the consequences of the GDC’s need to withhold information from inmates, the public, and even the courts, “especially given the recent much publicized botched execution in Oklahoma.”²⁰¹ Wilson urged that access to information about lethal-injection protocol is necessary for courts to carry out their constitutional role of determining whether an execution violates the Eighth Amendment “before it becomes too late.”²⁰²

196. *Id.*

197. *Id.* (quoting *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 876 (9th Cir. 2002)).

198. *Wellons*, 754 F.3d at 1267.

199. *Id.* (quoting *Baze*, 553 U.S. at 51).

200. *Id.* at 1267–68.

201. *Id.* at 1268.

202. *Id.*

The same day the Eleventh Circuit rejected Wellons' First and Eighth Amendment arguments, the U.S. Supreme Court denied Wellons' twin requests to stay his execution and for a writ of certiorari.²⁰³ He was killed shortly thereafter, marking what the *Washington Post* noted was "the nation's first execution since a botched lethal injection in Oklahoma in April."²⁰⁴

C. *Owens v. Hill*²⁰⁵

Like the Eleventh Circuit in *Wellons*, the Supreme Court of Georgia in *Hill* upheld Georgia's Lethal Injection Secrecy Act,²⁰⁶ in part because of a long history and tradition of concealing the identities of execution participants for their protection.²⁰⁷ Warren Lee Hill, an inmate at the Lee County Correctional Institute, faced death by lethal injection for murdering another inmate.²⁰⁸ A county judge sentenced Hill to death in an order issued only two days after the effective date of the Secrecy Act.²⁰⁹

Georgia thus only informed Hill that the drug used in his execution would be produced by a compounding pharmacy.²¹⁰ Hill sued, seeking access to sealed information about the "identity of the compounding pharmacy and the supply chain and manufacturer(s) of any and all ingredients used to produce the lethal drug compound"²¹¹ that would be used in his injection.²¹² He brought constitutional claims under both the First and Eighth Amendments.²¹³

Citing *Baze v. Rees*,²¹⁴ the Georgia high court explained that, to establish a viable Eighth Amendment claim, Hill needed to prove an "objectively intolerable risk of harm"²¹⁵ resulting from the use of the

203. *Wellons v. Owens*, 134 S. Ct. 2838 (2014).

204. *Georgia Inmate Is First To Be Executed After Botched Lethal Injection*, WASH. POST (June 18, 2014), https://www.washingtonpost.com/politics/major-child-porn-distributor-sentenced-to-30-years/2014/06/17/570b3efc-f65e-11e3-8aa9-dad2ec039789_story.html.

205. 295 Ga. 302 (Ga. 2014).

206. O.C.G.A. § 42-5-36 (2013).

207. *Owens*, 295 Ga. at 316, 318.

208. *Id.* at 302.

209. *Id.* at 303. The Secrecy Act took effect on July 1, 2013 and the sentencing court issued the order on July 3, 2013. It set Hill's execution for the week of July 13, 2013, effectively giving Hill only ten days to challenge the new law. See Andrew Cohen, *New 'Injection Secrecy' Law Threatens First Amendment Rights in Georgia*, COLUM. JOURNALISM REV. (July 17, 2013), http://www.cjr.org/behind_the_news/georgia_lethal_injections_shie.php.

210. *Owens*, 295 Ga. at 319.

211. *Id.* at 303.

212. *Id.*

213. *Id.* at 304, 315.

214. 553 U.S. 35 (2008).

215. *Owens*, 295 Ga. at 309.

compound drug.²¹⁶ To meet this high threshold of proof, Hill's expert witness testified that drugs made in compounding pharmacies "are of less reliable quality"²¹⁷ than those produced by manufacturers subject to FDA regulation.²¹⁸ The expert estimated that thirty-four percent of the products labeled by the pharmacies as "sterile" were actually contaminated, but he admitted difficulty in knowing what percentage of compounded drugs are unsafe.²¹⁹ Side effects from unsterile drugs include sudden drops in blood pressure, seizures, intravenous pain, pulmonary embolism, and death.²²⁰

The Georgia Supreme Court was not persuaded. It held that because prisoners become unconscious from an overdose of anesthetic before the lethal drug is injected, "the prisoner will never have an opportunity to suffer the negative medical effects . . . from a possibly non-sterile drug."²²¹ It even opined that while contaminated drugs may have fatal side effects, "such a side effect obviously would be shockingly undesirable in the practice of medicine, but it is certainly not a worry in an execution."²²² Thus, the court ruled that Hill failed to state a colorable Eighth Amendment claim because his expert "gave no clear indication regarding the level of risk involved."²²³ The court then weighed this lack of evidence against the fact that pentobarbital is a common drug produced in a facility that manufactures "millions of prescriptions per year."²²⁴

The lower court in *Hill* held that the Secrecy Act violated the First Amendment because it denied Hill access to information and to government proceedings.²²⁵ In reversing this decision, the Georgia Supreme Court distinguished the "freedom to disseminate information already within one's own possession"²²⁶ with what it believed to be the issue in Hill's case, namely Georgia's "refusal to disclose information within its control."²²⁷ Based on this distinction, the court interpreted Hill's argument as little more than bootstrapping a Freedom of Information Act

216. *Id.* at 309–10.

217. *Id.* at 310.

218. *Id.*

219. *Id.*

220. *Id.* at 311.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* (citing *Sells v. Livingston*, 561 F. App'x 342 (5th Cir. 2014)). Next, Hill argued that the Secrecy Act violates his due process right to access to the courts. In response, the court found that "losing in court is not the same as being denied access to the courts." *Id.* at 313–14. It reasoned that Hill's access claim is "belied by the proceedings below and the instant appeal." *Id.*

225. *Id.* at 315.

226. *Id.* (emphasis in original).

227. *Id.* at 315 (emphasis in original).

request to the First Amendment. As the court reasoned, Hill could not “turn the First Amendment into an Open Records Act for information relating to executions.”²²⁸

Similarly, the court rejected Hill’s argument that he was denied access to a historically open government proceeding.²²⁹ Georgia’s high court applied the history/experience and logic test from *Press-Enterprise II* and ruled that Hill failed to satisfy both prongs.²³⁰ First, the court explained that, although public access to executions has been mostly open, “historically, executioners have hidden behind a hood—both literally and figuratively.”²³¹ Second, the court held that public access to lethal injections—and by analogy, access to information about the processes—would play a negative role in the functioning of executions.²³²

It relied on the importance of privacy to justify its conclusion under both prongs,²³³ holding that “[a]lthough many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly.”²³⁴ It also noted that maintaining the privacy of the drug manufacturers and executioners would protect those companies and individuals from harassment or retaliation by inmates and members of the public who oppose lethal injection.²³⁵ This, in turn, avoids the risk that drug manufacturers and executioners may, due to fear of reprisal, grow unwilling to perform their duties.²³⁶

Dissenting, Justice Robert Benham recalled the gruesome and gory details of Oklahoma inmate Clayton Lockett’s lethal injection, in which his “veins failed, he reportedly twitched and mumbled, even after having been declared unconscious, and, although officials attempted to halt the execution, Lockett died forty-three minutes after the first drug had been administered.”²³⁷ Worst of all, Justice Benham noted, the cause of this botched execution remains unknown.²³⁸ Benham feared Georgia was “on a path that, at the very least, denies Hill and other death row inmates the

228. *Id.* at 316.

229. *Id.* at 317–18.

230. *Id.* at 316.

231. *Id.* (quoting Ellyde Roko, *Executioner Identities: Toward Recognizing a Right to Know Who Is Hiding Beneath the Hood*, 75 *FORDHAM L. REV.* 2791, 2829 (2007)).

232. *Id.* at 317.

233. *Id.* at 316–317.

234. *Id.* at 316 (quoting *Press-Enterprise II*, 478 U.S. 1, 10–12).

235. *Id.*

236. *Id.* at 317.

237. *Id.* at 318.

238. *Id.*

rights to due process and, at the very worst, leads to the macabre results that occurred in Oklahoma.”²³⁹

Benham rejected the majority’s privacy rationales, reasoning they did not justify forgoing “constitutional processes in favor of secrecy, especially when the state is carrying out the ultimate punishment.”²⁴⁰ Like Judge Charles Wilson, who concurred in *Wellons*, Justice Benham criticized the majority for its hypocrisy, stating that “the speculation permeating Hill’s claims arises solely from the State’s unwillingness, in light of the secrecy statute, to disclose information that would allow him to make more specific claims.”²⁴¹ Benham belittled, if not scoffed at, the fact that Georgia promised Hill the drugs used in his execution would be safe.²⁴² He claimed “these assurances amount to little more than hollow invocations of ‘trust us.’”²⁴³

Proposing a compromise, Justice Benham suggested a solution that would foster the First Amendment and protect participants:

I would grant [Hill] access to information identifying the compounding pharmacy that produces his execution drug; although, I would direct that the information be released under appropriate safeguards to minimize any harm to individuals who are simply performing their jobs. Likewise, because learning the source of the bulk materials used by the compounding pharmacy could lead to information supporting Hill’s cruel and unusual punishment claim, I would also order that information disclosed to Hill.²⁴⁴

Thus, Justice Benham echoed a key argument in this article—that the First Amendment demands that the public and inmates have access to information about lethal injections, and that this access will not unduly disrupt the sensitive process.

In summary, with the exception of the Ninth Circuit’s ruling in *Wood*, which the U.S. Supreme Court quickly tossed out, the *Press-Enterprise II* doctrine failed to provide access to the inmates in *Wood*, *Wellons*, and *Hill*. Because doctrinal support for a First Amendment right of access to detailed information about lethal injections is weak at best, Part IV next addresses a

239. *Id.*

240. *Id.* at 319.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 320.

trio of First Amendment theories that, conversely, supports access to detailed data regarding lethal-injection drugs, personnel, and procedures.

IV. A First Amendment Theory Perspective: Moving Beyond the Realm of Dated Doctrine to Examine a Modern Controversy

This part explores how three time-honored theories of freedom of expression, although each being subject to scholarly criticism,²⁴⁵ support expanding a judicially created First Amendment right of access to certain governmental proceedings to also encompass requests for detailed factual information about lethal injections involving specific death-sentenced inmates.

A. Marketplace of Ideas

What is the truth, as it were, about lethal-injection executions as they are now carried out in the United States? Are they really more humane or painless today than other forms of state-sponsored executions?²⁴⁶ Are the drug-based cocktails served up in some states of sufficient formula and strength to ensure speedy deaths? Are the people, in turn, who mix and administer those drugs—morbidity mixologists, as it were—adequately trained to do so properly and effectively? The marketplace of ideas theory, as described below, demands public access to all state-possessed information that could lead to truthful answers about such important life-and-death questions.

The marketplace theory²⁴⁷ is, as First Amendment scholar Rodney Smolla writes, “perhaps the most powerful metaphor in the free speech tradition.”²⁴⁸ At the heart of this theory, Professor Daniel Solove asserts, is the notion that free speech “contributes to the promotion of truth.”²⁴⁹ An open marketplace of ideas is valuable both because it allows the public to

245. See Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 61, 62 (Lee C. Bollinger & Geoffrey R. Stone eds. 2002) (referring to these three theories as a “tired trilogy of conventional free-speech justifications” that are “at worst so abstract and protean as to be of limited intellectual or practical utility”).

246. The lethal injection “method was initially introduced precisely because it was supposed to be more humane than the electric chair or the gallows.” Serge Schmemmann, *Celebrating Sainthood and Witnessing Barbarity*, N.Y. TIMES, May 4, 2014, at Sunday Review 2.

247. See JOHN STUART MILL, ON LIBERTY 75–118 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859). The origin of the marketplace of ideas theory can be traced back to John Stuart Mill’s *On Liberty*, as Mill discussed the benefits of liberty. The theory was not named, but the exact logic for free thought and discussion was. *Id.*

248. Rodney A. Smolla, *Free Speech in an Open Society* 6 (1992).

249. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 998 (2003).

try to attain a truth²⁵⁰ and because it involves the never-ending process of seeking and testing supposed truths.²⁵¹

The marketplace theory thus provides a conceptual model for freedom of expression within a collective society, with the goal of “advanc[ing] human understanding about the nature of the world and the best way to live within it.”²⁵² As John Stuart Mill wrote in *On Liberty*, “[a]ll silencing of discussion is an assumption of infallibility.”²⁵³ Rather than silence discussion, Mill posited that:

[T]he only way in which a human being can approach to knowing the whole of a subject is by hearing what can be said about it by persons of every variation of opinion, and studying all the modes in which it can be looked at by every character of mind.²⁵⁴

“[O]nly through diversity of opinion,” Mill averred, “is there, in the existing state of human intellect, a chance of fair play to all sides of the truth.”²⁵⁵ Justice Oliver Wendell Holmes, Jr., as Professor Stanley Ingber writes, is credited with introducing the marketplace of ideas “concept into American jurisprudence in his 1919 dissent to *Abrams v. United States*.”²⁵⁶ In *Abrams*, Holmes argued that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”²⁵⁷ Nearly a full century later, Justice Anthony Kennedy reaffirmed this maxim and the power of the marketplace metaphor in *United States v. Alvarez*,²⁵⁸ writing for the plurality that “[t]he theory of our Constitution is ‘that the best test of

250. The attainment of a political truth as a valuable result of the marketplace of ideas was espoused by Justice Louis Brandeis in his concurrence in *Whitney v. California*, in which Brandeis suggested that truth could be ascertained through the “power of reason as applied through public discussion.” 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

251. The value implicit in the process of truth seeking was advocated by Justice Oliver Wendell Holmes, Jr. in his dissent in *Abrams v. United States*, in which Holmes argued that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

252. Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 9 (2008).

253. MILL, *supra* note 247, at 77.

254. *Id.* at 80.

255. *Id.* at 111.

256. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984).

257. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

258. 132 S. Ct. 2537 (2012).

truth is the power of the thought to get itself accepted in the competition of the market.”²⁵⁹

The subjective and normative nature of ethical and political debates like those surrounding the death penalty and lethal-injection procedures are highly contestable, in part because society needs a higher order of judgments based on perceptions of reality and human nature to resolve them.²⁶⁰ Just as the way the news media frame an issue affects how the public perceives it,²⁶¹ a lack of information and knowledge about an issue can equally distort reality.²⁶² Thus, the public requires knowledge of facts, procedures, ideas, and perspectives to reach a proper resolution in such ethical and political matters.

The marketplace of ideas suffers without a steady influx of information. Detailed data about the drugs, personnel, and procedures used in lethal injections is necessary for the public to engage in robust, accurate, and fair discussions about the validity and vitality of the death penalty. Furthermore, this vigorous debate is necessary for the public to reach a fair political consensus about the procedures involved in carrying out a death sentence. The nature of normative topics, especially sensitive ones like lethal injections, is that there are a variety of viewpoints. The marketplace of ideas theory strives to include all viewpoints so that the public can reach the fairest consensus about even the most sensitive issues. The theory thus demands that the public, as well as the condemned, receive as much information as possible to decide the truth about the state of lethal injections in the United States today.

If the issue is framed as whether lethal injections provide a humane and painless way of killing a person, then knowing as much information as possible about how they are carried out (and who carries them out) can help the public and lawmakers to understand if it is, indeed, true that they are humane and painless. Similarly, if the issue is posed as whether death by lethal injection today in the United States constitutes cruel and unusual punishment under the Eighth Amendment, then also knowing as much information as possible about how such injections occur can help the U.S. Supreme Court to reach its own truth about that question. In brief, the marketplace theory strongly militates in favor of providing the public with access to as many facts and details as possible regarding the implementation of lethal injections. The “truth” about lethal injections demands access to factual information that affects them.

259. *Id.* at 2550 (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)).

260. Gey, *supra* note 252, at 8.

261. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 15 (1989).

262. Paul R. Brewer & Kimberly Gross, *Values, Framing, and Citizens' Thoughts About Policy Issues: Effects on Content and Quantity*, 26 POL. PSYCHOL. 929, 931 (2005).

B. Democratic Self-Governance

Philosopher and educator Alexander Meiklejohn believed, as First Amendment scholar Lucas Powe writes, “that freedom of speech is protected because it is an essential aspect of self-governance.”²⁶³ Professor Pierre J. Schlag concurs, asserting that Meiklejohn thought that “in a democratic society, self-government is an important value and that political or public speech is essential to self-government.”²⁶⁴

In *Free Speech and Its Relation to Self-Government*,²⁶⁵ Alexander Meiklejohn wrote that in the “method of political self-government, the point of ultimate interest is not the words of the speakers, but *the minds of the hearers*.”²⁶⁶ In other words, people must have access to as much information as possible to enable “the voting of wise decisions.”²⁶⁷

Few discussions today, of course, are as fraught with politics as those involving the death penalty.²⁶⁸ Voters, in turn, hold the power to elect or reject politicians based upon their stances toward the death penalty. As the *Washington Post* noted in 2012, “the repeal of the death penalty is a mixed bag for a politician with national aspirations.”²⁶⁹

Meiklejohnian theory, with its emphasis on making voters wise by requiring “that everything worth saying shall be said,”²⁷⁰ is directly relevant for supporting public access to details about the drugs, personnel, and procedures used in lethal injections. For a state like Arizona to deny the public access to these facts amounts to a government-sanctioned “mutilation of the thinking process,”²⁷¹ to borrow Meiklejohn’s fine phrase. How so? By not having all of the facts regarding lethal injections—facts already known to and possessed by the government, but now kept behind a legal wall—citizens can neither think clearly nor vote wisely. Arizona must prioritize “the minds of the hearers”²⁷²—the minds of its citizens, the

263. LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 238 (1991).

264. Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 *UCLA L. REV.* 671, 707 (1983).

265. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

266. *Id.* at 25 (emphasis added).

267. *Id.*

268. See Pema Levy, *An Unlikely Conservative Cause: Abolish the Death Penalty*, *NEWSWEEK*, May 23, 2014, at 1 (“[The Republican Party] is still squarely in the pro-death-penalty camp. Ending capital punishment, which for years critics have argued disproportionately affects minorities, is considered a liberal issue . . . [t]he Gallup poll [conducted in October 2013] showed 81 percent of Republicans support it, versus 47 percent of Democrats.”).

269. John Wagner, *Death Penalty Is at an ‘Impasse,’* *WASH. POST*, Nov. 25, 2012, at C1.

270. Meiklejohn, *supra* note 265, at 25.

271. *Id.* at 26.

272. *Id.* at 25.

minds of its voters—above secrecy and paternalistically keeping them in the dark. Voters need to be as knowledgeable as possible, having had the opportunity to hear all relevant data on lethal injections, in order to reach the best decision about a candidate who takes a public stance on the death penalty and, in particular, how it should be carried out.

For instance, the Utah House of Representatives voted 39 to 34 in February 2015 to bring back the firing squad as a method of execution if the required drugs for a humane lethal injection are not available.²⁷³ The deep divide among Utah's lawmakers, as reflected by the 39-34 split, demonstrates the contested political nature of death penalty procedures. Utah citizens, in turn, may consider how their representatives voted on the matter during the next election cycle. Concomitantly, to decide if death by firing squad is really more humane than death by lethal injection, the public must have access to as many facts as possible about the latter method of death. In brief, then, death by lethal injection is a matter of public concern, and voters must be provided with access to all relevant data that could influence and affect how they vote on matters related thereto. Meiklejohnian's theory thus supports the creation of a First Amendment right of access for the public to receive detailed information regarding lethal injections.

C. Self-Realization/Human Dignity

In addition to collectivist free speech goals such as discovering and testing conceptions of the truth and enabling successful democratic self-governance, speech—both the right to speak and the right to receive speech—can be inherently valuable to an individual. Indeed, “individual self-fulfillment and participation in change are fundamental purposes of the First Amendment,” according to the late Professor C. Edwin Baker of the University of Pennsylvania Law School.²⁷⁴

Likewise, Thomas Emerson stressed that “freedom of expression is essential as a means of assuring individual self-fulfillment.”²⁷⁵ Importantly, Emerson asserted that when the government acts “to cut off [a person's] search for the truth,” the government “elevate[s] society and the state to a despotic command over him and place[s] him under the arbitrary control of others.”²⁷⁶

Thus, when Arizona cuts off an inmate's access to the truth about the drugs, personnel, and procedures that will end his or her life, the

273. Erica Palmer, *Firing Squad Bill Passes Utah House After Tough Debate*, SALT LAKE TRIBUNE, Feb. 13, 2015, at Politics.

274. Baker, *supra* note 261, at 51.

275. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970).

276. *Id.*

government is depriving that inmate of the autonomy and ability to learn and to realize precisely how he or she will die. In his concurrence in *Whitney v. California*, Justice Louis Brandeis wrote that “those who won our independence believed that the final end of the State was to make men free to develop their faculties.”²⁷⁷ An inmate is denied the ability to develop his faculties when the government thwarts his access to information that affects how he will die. If not for the possible physical pain one might endure, the mystery of what will happen during one’s last moments could be interpreted as a psychological torture of the worst kind, resulting in an abject failure to reach self-fulfillment. One ends life without knowing precisely how it will be terminated. Devoid of the ability to pass from this world with the grace of knowing oneself and one’s fate, human dignity is stripped from the executed just like his or her life.

While the Arizona Department of Corrections in *Wood* may have had its reasons for withholding procedural information, the government should need to prove that these reasons are of a higher priority than one’s autonomy and self-realization. The government must demonstrate that its limitations on transparency are worth stripping away the remaining dignity of fellow human beings in their final moments.

In summary, as Justice Brandeis wrote more than eighty-five years ago in *Whitney*, the founders of the United States “eschewed silence coerced by law.”²⁷⁸ States like Arizona in *Wood* and Georgia in *Wellons* and *Hill* described in Part III engage in government-coerced silence about lethal injection facts and procedures. They thwart, in Brandeis’s terms, “the power of reason as applied through public discussion.”²⁷⁹

Ultimately, the marketplace of ideas theory requires the public be supplied by states with detailed facts about lethal injections so that society can attempt to know the truth about this method of death. The theory of democratic self-governance, in turn, demands that voters have as much information as possible about such procedures and personnel in order to vote wisely in favor of or against politicians who support or condemn them. They may also need that information to vote wisely on state referenda and ballot initiatives related to the death penalty. And, finally, the theory of self-realization requires that the condemned be informed of the facts about their pending deaths so that they will understand and be able to mentally confront exactly what it is that will end the liberty that is life.

277. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

278. *Id.* at 375–76.

279. *Id.* at 375.

V. Conclusion

Debate rages today about access to detailed information regarding lethal injections. For example, in February 2015 Virginia lawmakers considered a bill under which executions in that state “would become shrouded in unprecedented secrecy”²⁸⁰ by shielding the names of drug manufacturers from public scrutiny. As the *Washington Post* reported, “although the names and quantities of chemicals used would have to be disclosed, the names of the companies that sell them and information about buildings and equipment used in the process would be withheld.”²⁸¹

In the face of such measures, this article made the case that, regardless of the doctrinal problems of access under the *Press-Enterprise II* test experienced in the trio of 2014 cases examined in the Introduction and Part II, First Amendment theory demands public and inmate access to details about the drugs, procedures, and personnel involved in lethal-injection executions.

As addressed in Part II, the experience and logic test from *Press-Enterprise II* typically dictates the public’s access rights to governmental proceedings, including executions.²⁸² This test requires judicial examination, first, of whether a process has been historically open, and second, whether access plays a “significant positive role” in the functioning of that process.²⁸³ At first glance, the right of access to information about lethal-injection drugs and the right of access to view executions, which was recognized by the Ninth Circuit both in *California First Amendment Coalition v. Woodford*²⁸⁴ and *Associated Press v. Otter*,²⁸⁵ seem similar enough that the history/experience and logic test should apply equally to both situations. However, the test suffers from several flaws.

In particular, satisfying the experience and logic test creates only a qualified right of access that courts have been unable to clearly define.²⁸⁶ Thus, the application of the test has been, at best, mishandled and, at worst, ignored.²⁸⁷ This lack of precedent has placed immeasurable discretion in the hands of district court judges who are given the ability to decide what is “good” or “desirable” instead of what is “constitutionally commanded by

280. Rachel Weiner, *Va. Bill Calls for Secrecy on Lethal Injections*, WASH. POST, Feb. 6, 2015, at A1.

281. *Id.*

282. *Press-Enterprise II*, 478 U.S. 1, 8–9 (1986).

283. *Id.*

284. 299 F.3d 868 (9th Cir. 2002).

285. 2012 U.S. App. LEXIS 12128 (9th Cir. June 8, 2012). *See supra* notes 103-06 (addressing both *Woodford* and *Otter*).

286. *Supra* notes 91-94 and accompanying text.

287. *Id.*

the First Amendment.”²⁸⁸ Because of this unbridled discretion, case law applying the history/experience and logic test is subjective and inconsistent, and ranges from access to criminal trials to attendance at wild horse gathers.²⁸⁹

Application of the experience and logic test is inconsistent even within the single context of access to information about lethal injections. For instance, in 2014 in *Wood v. Ryan*, the U.S. Court of Appeals for the Ninth Circuit interpreted the experience prong of the test broadly.²⁹⁰ It reasoned that hangings and details about gas chambers were historically open to the public, and information about lethal-injection drugs were “inextricably intertwined” with the execution itself.²⁹¹ Based on this, the court found a tradition of access to executions that conclusively extended to data about lethal injections. It further held that a series of botched executions that year justified a “more-information-the-better” approach.²⁹²

In stark contrast, both the U.S. Court of Appeals for the Eleventh Circuit and the Supreme Court of Georgia applied the same test as *Wood*, during the same year as *Wood*, but reached dramatically different conclusions with fatal results. In *Wellons v. Commissioner*, the Eleventh Circuit failed to directly address the inmate’s arguments under the experience and logic test, and instead held merely that the First Amendment does not afford an inmate “the broad right to know” detailed information about his lethal injection.²⁹³

In *Owens v. Hill*, the Georgia court relied on the interest of privacy to hold that it was in the best interest of the personnel involved in lethal injections to keep the information from public view.²⁹⁴ Only the concurrence and dissent in *Wellons* and *Owens*, respectively, highlighted the hypocrisy of the two courts in simultaneously requiring an inmate to bring specific Eighth Amendment claims while denying that inmate access to the details involved in those claims.²⁹⁵ The U.S. Supreme Court has not considered the rulings in *Wellons* or *Hill*, and it vacated the Ninth Circuit’s holding in *Wood* without addressing the First Amendment access arguments, thus leaving application of the experience and logic test ambiguous.²⁹⁶

288. Steele & Tsollias, *supra* note 94, at 1381–82.

289. *Supra* Part II, Section B.

290. *Wood v. Ryan*, 759 F.3d 1076, 1083 (9th Cir.), *vacated*, 135 S. Ct. 21 (2014).

291. *Id.*

292. *Id.* at 1085–86.

293. 754 F.3d 1260, 1267 (11th Cir. 2014).

294. 295 Ga. 302, 316–17 (Ga. 2014).

295. *Wellons*, 754 F.3d at 1267–68; *Owens*, 295 Ga. at 318.

296. *Ryan v. Wood*, 135 S. Ct. 21 (2014).

As mentioned in this article's Introduction, public opinion about death by lethal injection is in a state of instability.²⁹⁷ Public support for the death penalty has dropped by nearly twenty percent in just as many years, and the American Board of Anesthesiology has explicitly removed itself from involvement in the lethal-injection process.²⁹⁸ As a result, the safety of lethal-injection procedures is in decline.²⁹⁹ Despite the horrific tales of Joseph Wood and Clayton Lockett—who gasped for air and suffered gruesomely before their drug cocktails took effect³⁰⁰—the vibrant and volatile debate about lethal injection itself implicates a trio of First Amendment theories.

John Stuart Mill and the marketplace theory are famous for the proposition that “the only way in which a human being can approach to knowing the whole of a subject is by hearing what can be said about it by persons of every variation of opinion.”³⁰¹ The marketplace thrives on an abundance of information through which the public can sort and sift in an effort to attain truth about a topic, like lethal injections. Only by wading through a flourishing marketplace of ideas can the public truly engage in robust, accurate, and fair discussions about the humanity of lethal injections.

Similarly, only by possessing access to this abundance of information can the public reach an informed opinion, allowing it to participate in “the voting of wise decisions” as they exercise self-governance.³⁰² The democratic self-governance theory asserts that political or public debate is essential to self-government.³⁰³ In the context of lethal injections, educated public debate about lethal injections is necessary for the public to remain

297. Commentary, *Anesthesiologists and Capital Punishment*, *supra* note 51.

298. *Id.*

299. Deng & Lithwick, *supra* note 54.

300. Rivers, *supra* note 28, at C4 (describing the execution of Joseph Wood); Editorial, *Horror Stories in the Death Chamber*, *supra* note 37, at P2. In June 2015, the Oklahoma Supreme Court refused to reverse a lower court's decision denying Oklahoma Governor Mary Fallin's motion to dismiss an open records request for documents relating to Lockett's execution. Adam Marshall, *Oklahoma Supreme Court Unanimously Rejects Effort to Halt Public Records Lawsuit for Execution Records*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (June 11, 2015), <http://rcfp.org/browse-media-law-resources/news/oklahoma-supreme-court-unanimously-rejects-effort-halt-public-record>. The often heavily redacted documents, which were requested and reviewed by journalists at the *Tulsa World*, reveal “just how much of a ‘procedural disaster’ Oklahoma's execution of Clayton Lockett was.” Cary Aspinwall & Ziva Branstetter, *Records Reveal Lack of Protocol in Clayton Lockett's Oklahoma Execution*, TULSA WORLD (Mar. 16, 2015), http://www.tulsaworld.com/homepagelatest/records-reveal-lack-of-protocol-in-clayton-lockett-s-oklahoma/article_e4f17853-160c-530a-9f36-928a0fd9f605.html/.

301. MILL, *supra* note 247, at 80.

302. MEIKLEJOHN, *supra* note 265, at 25.

303. POWE, *supra* note 263, at 238.

wise and informed when voting to elect representatives who have certain stances on the death penalty.

Finally, the self-realization/human dignity theory posits that freedom of speech and expression are “essential as a means of assuring” man’s ultimate goal—“individual self-fulfillment.”³⁰⁴ This theory reflects the importance of access to information about lethal injections, particularly for the inmate himself. When the government restricts access to information about an impending lethal injection—especially in the wake of so many botched executions in 2014 alone—the government is effectively depriving an inmate of the ability to realize and understand his own death.

These theories, coupled with the sorry state of the experience and logic test, demand a reexamination of the First Amendment access doctrine as it relates to lethal-injection drugs, personnel, and procedures. The U.S. Supreme Court should grant certiorari in a future death-by-lethal-injection case in order to untie the knot created by a misapplication of the experience and logic test. Like the Ninth Circuit in *Wood*, the Court must move beyond the narrow barriers of the test to recognize that current public debate and First Amendment theory support—even require—access to detailed information about lethal injections.

304. BAKER, *supra* note 261, at 51.